Nos. 292 and 294

In the Supreme Court of the United States

OCTOBER TERM, 1948

GEORGE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ALBERT J. DILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions (R. 1038-1050) in the court of appeals have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered August 23, 1948 (R. 1050). The petitions for writs of certiorari were filed September 22, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner Smith's voluntary offer of testimony before an O.P.A. official constituted a waiver of immunity from prosecution for the offenses of which he stands convicted.

2. Whether petitioner Deeb has standing to complain of the denial of petitioner Smith's claim of immunity.

STATUTES INVOLVED

Section 202 of the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 58 Stat. 632, 50 U.S.C. App. 922, provides:

> (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.
>
> (b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations,

to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

* * *

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U.S.C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

The Compulsory Testimony Act of February 11, 1893, 27 Stat. 443, 49 U.S.C. 46, provides:

That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal

or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any Amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than $100 nor more than $5,000, or by imprisonment for not more than one year or by both such fine and imprisonment.

STATEMENT

On March 31, 1947, two informations of 41 counts each were filed against petitioners Smith and Deeb and Daisart Sportswear Inc. charging them with the unlawful application and extension of preference ratings in the purchase of textiles

and with the illegal diversion of the materials to other than certified uses, in violation of Section 301 of the Second War Powers Act (56 Stat. 177; 58 Stat. 827; 60 Stat. 868; 50 U.S.C. App. 633) (R. 15-20). On September 23, 1947, petitioners and the corporation were indicted for conspiracy to violate the Emergency Price Control Act of 1942 (50 U.S.C. App. 901 et seq.) by selling finished piece goods at prices in excess of the ceilings established by O.P.A. regulation (R. 21-26). The two informations and the indictment were consolidated for trial (R. 28-32). So far as material to the issue presented in the petitions for certiorari, the evidence may be summarized as follows:

Smith was the sole owner of Daisart Sportswear Inc. (R. 1014) and Deeb was a salesman for the company (R. 375). During 1944 and 1945, petitioners and the corporation obtained textiles by the use of certain priority ratings, originally granted by the War Production Board to Metals Disintegrating Company (e.g., R. 237, 376, 377, 733). Petitioners certified that the materials were to be used for the manufacture of ammunition powder bags for the Army and, by using the applicable top priorities, they acquired about two and one-half million yards of textiles (R. 734). They used only forty-nine thousand yards for the certified purpose (R. 721) and sold the balance to civilian handkerchief, dress, negligee and rain-

coat manufacturers at prices in excess of established O.P.A. ceilings (e.g. R. 82, 418, 432-433, 459, 743-744).

In carrying out these activities, petitioners and the corporation failed to keep records (R. 384, 393) and engaged in transactions under fictitious names (R. 631, 612, 630, 668). They invoiced goods at fictitious prices (R. 215, 425, 459, 500) and under false descriptions (R. 471). Neither defendant took the stand.

Testimony relative to these transactions had been given before an O.P.A. official by petitioner Smith on April 30, 1946, and a transcript of his testimony was received in evidence as against the corporation (R. 655-656, 849-850, 857, 983; 1009-1030). The circumstances under which this testimony was given are undisputed (R. 1009-1030). Smith had appeared with counsel in response to two subpoenas which had been served upon him—one in his individual capacity and the other as an officer of Daisart Sportswear Inc. The subpoenas called for the production of all books, records and documents of himself or the corporation pertaining to the purchase, manufacture and sale of materials and fabrics from January 1, 1945, to the day of the examination (see R. 1012, 1013). After Smith was sworn, the O.P.A. examiner advised him that in accordance with constitutional guarantees he could not be compelled to make any self-incriminating statements. (R.

1010). After answering a few preliminary questions, Smith asserted a claim of "privilege as to anything that I say" (R. 1011). He explained his failure to produce any of the records called for by the subpoenas on the ground that they had been either destroyed, lost or misplaced (R. 1012-1013). He testified that he was the sole stockholder, officer and director of Daisart Sportswear Inc. which, prior to October 1945, had been engaged in the manufacture, purchase and sale of textiles and allied products (R. 1015). He also testified that as part of its operations Daisart was a contractor for several manufacturers, including Metals Disintegrating Company, which, in turn, was under contract to mapufacture ammunition bags directly for the United States Government (R. 1018). Smith denied that Daisart had ever purchased materials and fabrics for the sole purpose of reselling them (R. 1019). He gave the names of three of the concerns from which Daisart had purchased materials in connection with its manufacturing operations. He also gave the name of the bank upon which checks were drawn in paying for the purchases. (R. 1021.)

Smith testified further before the O.P.A. examiner that it was customary for the manufacturers to supply the materials upon which the work was performed by Daisart; if surplus or waste resulted, it was tacitly understood that Daisart could sell it for its own account (R. 1025).

In response to a question concerning the company's method of computing the prices of materials which it sold, Smith testified that "since it was surplus, it was sold at the price billed to me plus freight and haulage and less discount allowed to me" (R. 1019). In a subsequent portion of his testimony, the following occurred (R. 1026-1027):

> Question: So that with respect to Daisart Sportswear Inc., contracting activities on ammunition bag materials, [the materials] were shipped by the manufacturer without bill?
>
> Answer: It was not. Metals Disintegrating Company being a foreign concern and being unable to furnish this material, they asked me to purchase materials for them. They were aware that I cannot do that without proper priorities. Those priorities were forthcoming in a blanket sum. No stipulated amount and I was further told to maintain a constant stock for any orders they may call. I mean Daisart Sportswear Inc., for any orders they may call for. Their orders came to me sometimes dated and never in any set size or specified form. They charged [*sic*] from day to day. I then went about purchasing material for their work. When and if I had a surplus, I would notify them and ask them if they had anything immediately on hand as I am overstocked, at which time they told me they had not and to dispose of it.
>
> Question: This is a voluntary statement. You do not claim immunity with respect to that statement?
>
> Answer: No.
>
> Question: I assume that anything you tell us, Mr. Smith, is subject to verification? You state that after a time Metals Disintegrating Company, although it had a contract with

the government, was not in a position to furnish you with the materials necessary for Daisart to manufacture this item?

Answer: Right.

Question: And that because of that situation, Daisart was required to obtain priorities so that Daisart could obtain the materials and that it did so?

Answer: In a blanket amount.

Question: And that pursuant to that priority, Daisart thereafter acquired materials, some of which were used in the manufacture of ammunition bags for Metals, and some of it was disposed of by Daisart, is that correct?

Answer: Yes.

Question: And those disposals by Daisart formed a good part of the sales of fabrics made by Daisart?

Answer: They did.

Petitioner Smith and the corporation were found guilty on 35 counts and petitioner Deeb on five counts of each of the two informations. The three defendants were found guilty on the conspiracy indictment. (R. 988-990.) Petitioner Smith and the corporation were fined $710,000 each and Smith was sentenced to a total of three years' imprisonment. Deeb was fined $20,000 and sentenced to imprisonment for a year and a day. (R. 1, 6, 11, 1001-1004.) The court of appeals affirmed the convictions of Deeb and the company in their entirety. Smith's convictions on 12 counts of each of the two informations were reversed on the ground that he had acquired immunity as to those charges by virtue of his testimony before

the O.P.A. examiner, but his convictions on the remaining counts of the informations and the conspiracy indictment were affirmed. The partial reversal decreased the total amount of the fines imposed upon him by $240,000. One judge dissented from the affirmance of Smith's conviction on the indictment on the ground that he had also acquired immunity as to that charge. (R. 1038-1050.)

ARGUMENT

In the absence of a grant of immunity, a witness summoned before an administrative official is entitled to rely upon the protection afforded by the Fifth Amendment and to refuse to give self-incriminating testimony. The immunity conferred upon a witness by the Compulsory Testimony Act, which was incorporated by reference in the Emergency Price Control Act of 1942, is coterminous with the protection against self-incrimination guaranteed by the Fifth Amendment. *Shapiro* v. *United States*, 335 U.S. 1, 19-20; *Heike* v. *United States*, 227 U.S. 131. Petitioner Smith concededly gave testimony before the O.P.A. official which substantially related to the transactions which were the subject of the indictment and the informations. If, therefore, his testimony had been compelled, he would have acquired immunity from prosecution for those offenses.

The exemption from the duty freely to give testimony in aid of the investigative process, however, is one which the witness may waive by volun-

teering his testimony. *United States* v. *Monia*, 317 U.S. 424, 427; *Raffel* v. *United States*, 271 U.S. 494. The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, not for those who do. Congress gave the O.P.A. power to cover the guilty with the cloak of immunity only when it was essential in order to ascertain material facts. Here, such testimony as substantially related to the convictions which this Court is asked to review was offered without compulsion. It is clear that Smith deliberately, in the presence of his counsel, volunteered the information on account of which he now claims immunity.

Smith was charged in two informations with unlawfully applying and extending priority ratings and unlawfully diverting materials so procured to other than certified uses. In his appearance before the O.P.A. examiner, he expressly volunteered the decisive disclosure of his dealings with the Metals Disintegrating Company, the use of blanket preference ratings to purchase materials, and the disposal of the surplus stock (*supra*, pp. 8-9). Except for this volunteered testimony, the only statement of Smith which bore any substantial relation to the offenses charged in the informations was the designation by him of three of the several concerns from which he and Daisart Sportswear had purchased textiles (R. 1021). The court of appeals allowed him the

benefit of the immunity statute as to all counts which were based on transactions with those three companies and, accordingly, reversed his conviction as to 12 counts of each of the informations. Although the disclosure of the names of the three selling concerns might well have been considered merely a detail of the general information which Smith voluntarily disclosed and thus have been deemed within the waiver of immunity, the Government has not sought review of the court of appeals' action in respect of those 24 counts.

The indictment charged Smith with participation in a conspiracy to violate the Emergency Price Control Act of 1942 and the applicable regulations by selling finished piece goods at prices in excess of the ceilings established by law. In his volunteered statement, Smith disclosed to the O.P.A. examiner that Metals Disintegrating Company had told him to dispose of all surplus materials which he had acquired by use of the blanket priority ratings and that such disposals formed a large part of Daisart's sales of fabrics (*supra*, p. 9). Earlier in the testimony before the O.P.A. examiner, Smith had stated that the surplusage which had been disposed of by sale had been "sold at the price billed to me plus freight and haulage and less discount allowed to me" (R. 1019). The court of appeals was of the opinion that Smith had not intended to claim immunity on account of this exculpatory statement since

substantially the same information was embraced within the tenor of the volunteered statement. As the court observed, the fact that in his volunteered statement Smith did not "repeat the OPA formula (which was of course no news or no new lead to the examiner) should not now procure him an immunity which, as it seems clear to us, he did not intend at the time to claim" (R. 1046). Actually, the information as to ceiling prices was innocuous, was not even suspicious and could not have been of aid in any prosecution. The dissenting judge thought that the information concerning the prices charged by Smith was separate and distinct from the volunteered testimony and was of the opinion that, despite its exculpatory character, it should have gained for him an immunity from prosecution for the conspiracy charged in the indictment.

Smith's contention (Pet. 13) that the court of appeals "erroneously misconceived the purpose of the immunity statute" is unwarranted. The burden of proof was upon Smith to establish his claim of immunity, which is an affirmative plea of confession and avoidance. Both the district court and the court of appeals, in denying his claim under the immunity statute, applied the principles laid down by this Court in *Brown* v. *Walker*, 161 U.S. 591; and *Heike* v. *United States*, *supra*, that a witness is entitled to immunity if disclosures which he is compelled to make substan-

tially relate to transactions upon which criminal charges are predicated. Any challenge to the decision below must be directed, therefore, to the correctness of the finding that Smith's voluntary statement was broad enough to cover the transactions upon which the informations and indictment were based and thus left no room for a claim that he acquired immunity in exchange for any compelled disclosures which he had made.

Petitioner Smith erroneously construes the majority opinion of the court of appeals as holding that testimony which is self-exonerating, as distinguished from self-incriminating, affords no basis for a claim of immunity under the Compulsory Testimony Act (Pet. 19). It was unnecessary, however, to reach that question, since the court found in the light of the volunteered testimony that Smith had not intended to claim immunity on account of his self-exonerating statement. This was the basis of the decision below, and the majority's observation concerning the effect of exculpatory testimony (R. 1046) is plainly *obiter dictum*. See also the dissenting opinion, R. 1048-1050. Hence, irrespective of whether immunity should be deemed to flow from a self-exonerating statement under other circumstances, it should not be extended in this instance since the statement was not given under compulsion.

Although this question is not involved here, it has been said that a witness who falsely exonerates

himself has by hypothesis not incriminated himself and, therefore, does not acquire immunity. "His privilege has not been infringed by the actual answer, even though it might have been by some other answer." 8 Wigmore, *Evidence* (3rd ed. 1940), § 2282, p. 504. The argument to the contrary is this: since the immunity statute was intended to be an exchange for the privilege guaranteed by the Fifth Amendment and since, under that constitutional guarantee, the witness could maintain silence when an answer might tend to incriminate him, the surrender of his right to remain silent is an adequate *quid pro quo* for immunity (see dissenting opinion below, R. 1048). However, in *Brown* v. *Walker, supra,* where it was argued that the immunity statute was not a full substitute for the constitutional protection because a witness who is prosecuted despite his disclosures is put to the expense and inconvenience of pleading immunity by way of confession and avoidance, this Court held that even though the witness might have preferred silence, the statutory immunity fully compensates for the withdrawal of the constitutional privilege.

It should not be overlooked, moreover, that even in the absence of an immunity statute, a witness might deem it to be to his advantage to volunteer exculpatory information in order to avoid any adverse inference that might be drawn from his silence. When exculpatory information is given

under the Compulsory Testimony Act, the determination whether the witness gave his testimony voluntarily is a question of fact for the court. In the instant case there was sufficient evidence to support the inference of the two lower courts that Smith did not intend to claim immunity on account of his self-exonerating statement.

Petitioner Smith also contends (Pet. 17) that his disclosure of the names of three companies from which Daisart had purchased materials gave the Government "leads which led it directly to the essential proof on the question of over-ceiling price at which the finished goods were sold." Putting aside the counts in the informations which related to those three concerns (which counts are not before this Court since the convictions based upon them were reversed), the disclosed names did not lead and could not have led to the discovery of the other crimes charged in the informations and the indictment. In the first place, the counts in the informations related to *separate and distinct transactions* with various designated firms from which Daisart purchased materials. Secondly, the indictment involved a conspiracy to *sell* materials at over-ceiling prices. (R. 21-26.) It is difficult to see how the disclosure of the names of some of Daisart's sources of supply could be deemed to bear a substantial relation to other sources of supply or to sales by Daisart. The conviction of conspiracy was amply supported by evidence which

had no substantial connection with any of the testimony for which Smith could properly claim immunity.

2. The privilege against self-incrimination is personal to the witness and, therefore, the immunity issue affects only petitioner Smith. Petitioner Deeb claims, however, that he might not have been convicted if Smith had been granted complete immunity, thus leaving Deeb to be tried alone, (Pet. 4-5). But even if Smith had been granted immunity, the corporation would have remained as a codefendant, and the identical evidence would have been presented. Moreover, no claim is made that the evidence which was admitted against Deeb was insufficient to support his conviction.

Petitioner Deeb also objects (Pet. 3-4) to a portion of the prosecutor's summation in which it was implied that Smith's testimony before the O.P.A. examiner showed knowledge on the part of the individual defendants of the applicable ceiling prices (R. 953). There was no objection by counsel for petitioner at the time this allusion to Smith's testimony was made by the prosecutor. Moreover, the latter had previously made it clear that Smith's testimony before the examiner was binding only upon the corporation (R. 916). In any event, any error in this regard was cured by the specific and careful charge of the trial court that Smith's testimony before the examiner was not to be considered by the jury in any way

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in determining the guilt or innocence of Smith or Deeb (R. 983).

CONCLUSION

The petitions for writs of certiorari present no questions warranting further review by this Court. We respectfully submit that the petitions should be denied.

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